The Nondelegation Doctrine and a Deep Dive Into Federal Taxation of Real Estate in 1798 That You Didn't Even Know You Needed

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Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 131 **Yale L.J.** (forthcoming 2021), *available at* SSRN.

Not so long ago, teaching the nondelegation doctrine in Administrative Law class was straightforward. Assign students an excerpt from *Whitman v. American Trucking Association*. Maybe add a bit of Justice Scalia's dissent in *Mistretta.* Discuss the emptiness of the intelligible-principle principle. Everyone in class agrees that, whether you like it or not, a nondelegation doctrine that can accommodate delegations to act in the "public interest" or set "fair and equitable" prices does not do very much to limit the scope of the modern regulatory state.

But change has been in the air for several years—as most clearly demonstrated by *Gundy v. United States* (2019). As readers of this website will likely recall, the Court in *Gundy* addressed a nondelegation challenge to the Sex Offender Registration and Notification Act (SORNA), which requires sex offenders to register before completing their sentences of imprisonment. Barring time travel, this requirement would have been hard to apply to persons who had completed their sentences before SORNA's enactment. To deal with them, SORNA delegated to the Attorney General the authority to "specify the applicability" of registration requirements and to "prescribe rules for registration." Justice Kagan, writing for a controlling plurality, found sufficient constraints in SORNA's text, purpose, and history to reject the nondelegation challenge. Just as about a century's worth of the Court's precedents might lead one to expect.

Justice Alito, concurring, expressed willingness to reexamine the nondelegation doctrine in a future case if a majority proves willing to do so, but thought singling out SORNA would otherwise be a bit "freakish."

Justice Gorsuch, in a dissent joined by the Chief Justice and Justice Thomas, condemned the intelligible-principle principle as a liberty-destroying "misadventure" that "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." He explained that delegations of rulemaking authority to agencies to govern private conduct are permissible in just three circumstances. First, if Congress makes the policy decisions, agencies can "fill up the details." Second, Congress can impose conditional rules that come into force only if an agency later finds some triggering fact to be true. Third, Congress does no harm when it "delegates" authority to the other branches that they already possess under the Constitution.

Take *Gundy*, mix in Justice Kavanaugh and maybe Justice Barrett, and we appear to have a solid majority of the Court interested in overhauling the nondelegation doctrine in a way that is at least consistent with the conclusion that much agency regulation of private conduct is unconstitutional.

In response to this prospect, three leading scholars of administrative law have recently produced two major law review articles that deploy originalist arguments to debunk the nondelegation doctrine. Professors Julian Mortenson and Nicholas Bagley, based on a wide-ranging survey of Anglo-American legal thought before and after 1789, conclude that "the overwhelming majority of Founders didn't see anything wrong with delegations as a matter of legal theory." (*Delegation at the Founding*, 121 **Columbia L. Rev.** (forthcoming 2021)) Turning to practice, they identify numerous delegations of generous grants of discretionary rulemaking authority to administrative authorities from the very early years of the Republic. In their view, squaring this history with a meaningful nondelegation doctrine requires too many gerrymandered exceptions to be remotely persuasive. *Delegation at the Founding*, which does not pull any

punches, has already generated a great deal of discussion in law reviews and the blogosphere. For one of several rejoinders, you might check out, Ilan Wurman's *Nondelegation at the Founding*, forthcoming in the *Yale Law Journal*.

The other major salvo, and the subject of the remainder of this jot, is Professor Nicholas Parrillo's splendid article with the really long title, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, which will be published next year in the *Yale Law Journal*. This article, too, examines early congressional legislation to shed light on whether the original understanding of the Constitution demands a nondelegation doctrine with sharp teeth. Rather than go for the magisterial sweep in the fashion of Mortensen and Bagley, however, Parrillo instead goes for the deep dive, exploring for over one hundred pages the discretionary powers that Congress granted to administrators to implement a tax on real estate that Congress imposed in 1798.

To explain why this 1798 tax is so important, Professor Parrillo notes that proponents of a strong nondelegation doctrine often try to explain away early congressional delegations by arguing that they fall into exceptions that allow more constitutional room for rulemaking. For instance, greater administrative discretion is permissible for foreign and military affairs because they fall within the natural domain of the executive in any event. Also, Congress can grant rulemaking discretion to administrative authorities to determine how to allocate benefits, services, and privileges. On this view, the nondelegation doctrine does, however, bar Congress from delegating to administrative authorities the power to promulgate "coercive regulation[s] of private rights and private conduct." (P. 9.)

One way to combat the nondelegation doctrine in this limited form is to contend, as Mortensen and Bagley do, that the exceptions represent an implausible effort to save the doctrine from the evidence of history. Another way is to find early congressional delegations that in point of fact did grant agencies coercive power over private rights. And, in the form of the 1798 federal real estate tax, Professor Parrillo has found just such a delegation.

He explains that, in its first decade, Congress relied on import duties and excise taxes to fund the federal government. In 1798, however, Congress needed another revenue stream to help pay for a military buildup. In the Lay and Collect Act, Congress therefore imposed a direct tax of 2 million dollars, which it apportioned across the states according to their populations. (P. 22.) This tax fell, in the first instance, on slaveowners, who were to pay a tax of 50 cents per slave. The remainder of the states' quotas were to be covered first by a progressive tax on houses and then, if necessary, by a flat tax on land. (Pp. 22-23.)

The Lay and Collect Act instructed that taxes on real estate should be calculated according to the terms of the Valuation Act. This statute, which Congress had enacted just a week earlier, provided that real estate should be valued at its "worth in money." (P. 22.) As Professor Parrillo deftly explains, the extreme vagueness of this standard was intentional.

The Valuation Act divvied up states into tax districts. Each district got a federal tax commissioner who had been nominated by the President and confirmed by the Senate. Together, the commissioners of a given state formed its federal tax board. There were 94 commissioners in all. They appointed, on a conservative estimate, over 2100 principal and assistant assessors to aid them in their work. For those keeping score at home, that's a bigger administrative apparatus than the Post Office had at the time. (P. 27.)

To enable the boards to carry out their functions, Congress delegated significant rulemaking powers to them. For instance, the Valuation Act gave each board authority to "establish all such regulations, as to them, or a majority of them, shall appear suitable and necessary, for carrying this act into effect; which regulations shall be binding on each commissioner and assessor, in the performance of the duties enjoined by, or under this act." (P. 27 (quoting Valuation Act).) The boards' "greatest" rulemaking power, however, enabled them to ensure fair allocation of the tax burden across districts by revising all the valuations in a district at once by rule. To this end, boards "had the power to raise or lower the tax assessments of thousands of property owners all at once, by any percentage amount, so long as the change 'shall appear to be just and equitable.'" (P. 30 (quoting Valuation Act).)

"Just and equitable." That sure sounds like a lot of regulatory discretion.

After explaining the structure, operation, and powers of the federal tax boards, Professor Parrillo explores:

- The informational and methodological difficulties of real estate valuation in the 1790s—and the wide discretion that the boards necessarily had in carrying out mass-revision rulemakings as a result;
- The political and contentious nature of the boards' authority to allocate tax burdens across different geographic areas with different economic interests (e.g., determining assessments for coastal areas versus backcountry);
- The binding nature of the boards' mass revisions, which were "final and absolutely binding on taxpayers" with no avenue for judicial review (P. 15); and
- The wide and bipartisan acceptance of the boards' powers—and the notable absence of constitutional objections to them in connection with the 1798 tax or to similar taxes that Congress imposed in later decades.

Professor Parrillo has, by poring over centuries-old records of an almost forgotten tax and placing them in historical context, produced a truly impressive piece of legal scholarship. His *Critical Assessment* should play an indispensable role in the post-*Gundy* evolution of the nondelegation doctrine.

(Also, did I mention it has 695 footnotes?)

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